



Edward T. Ramey
Direct Dial: 303 • 376 • 3712
eramey@hpgfirm.com

April 28, 2013

Via email
Christian Sederberg
1244 Grant Street
Denver, CO 80203

Re: Constitutionality of submission of draft amendment (4-22-13) to Colo. Const. art. XVIII, § 16, to vote of electors for approval or rejection in odd-numbered year

Dear Mr. Sederberg:

You have requested our legal opinion as to whether a specific proposed amendment to Colo. Const. art. XVIII, § 16 (Personal use and regulation of marijuana) may be submitted, upon two-thirds vote of each house of the General Assembly, to the registered electors of the state for approval or rejection in an odd-numbered year. The proposed amendment regarding which you have requested our opinion contains two primary components – (1) a proposed adoption of a retail marijuana sales tax (subject to decrease and increase within specified limits without further voter approval) and a retail marijuana excise tax (also subject to decrease and increase within specified limits without further voter approval), and (2) a proposed repeal of the entirety of Colo. Const. art. XVIII, § 16, should the voters fail to approve the proposed taxes.

It is our opinion that the submission to the electorate of the first component of the proposed amendment, as specified above, in an odd-numbered year would likely be deemed consistent with and appropriate under Colo. Const. art. X, § 20, though the submission of the second component of the proposed amendment – the conditional repeal of the entirety of Colo. Const. art. XVIII, § 16 – would be unconstitutional and invalid under Colo. Const. art. XIX, § 2.

The general constitutional requirements for submission by the General Assembly of proposed amendments to the Colorado Constitution to the registered electors of the state for their approval or disapproval are set forth in Colo. Const. art. XIX, § 2. Colo. Const. art. XIX, § 2(1) states that “*At the next general election for members of the general assembly, the said amendment or amendments shall be submitted to the registered electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this constitution*” (emphasis added). Pursuant to Colo. Const. art. V, § 2, general

elections for members of the General Assembly are held “on the first Tuesday after the first Monday in November *in each even-numbered year*” (emphasis added). Though consistent with Colo. Const. art. V, § 1(4)’s requirement that “[a]ll elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election,” Colo. Const. art. XIX, § 2, controls specifically with regard to proposed constitutional amendments referred by the General Assembly. *Nesbit v. People*, 36 P. 221 (Colo. 1894).

In 1992, the Colorado electorate adopted Colo. Const. art. X, § 20 (Taxpayer’s bill of rights), which provided for elections upon statewide “ballot issues” within the scope of that amendment in both even and odd-numbered years. Colo. Const. art. X, § 20(3)(a). Holding that the provisions of Colo. Const. art. X, § 20(3)(a) “apply only to issues of government financing, spending, and taxation governed by article X, section 20,” the Colorado Supreme Court has held that “the provisions of article X, section 20, supersede the general provisions of article V, section 1, of the Colorado Constitution only with respect to such issues” (referring to “issues of government financing, spending and taxation governed by article X, section 20”). *Zaner v. City of Brighton*, 917 P.2d 280, 286, 287 (Colo. 1996). The same rationale would apply, with equal or greater force, to the relationship of Colo. Const. art. X, § 20, to proposed constitutional amendments within the scope of Colo. Const. art. XIX, § 2. Indeed, the General Assembly reached precisely this conclusion in adopting its enabling (and clarifying) legislation regarding Colo. Const. art. X, § 20, when it stated that other provisions of the Constitution were not to be deemed repealed or amended by implication – § 1-41-101, C.R.S. (2012) – and providing that “[a]mendments to the state constitution submitted by the general assembly in accordance with article XIX of the state constitution” could appear on the ballot in odd-numbered years only “if they concern state matters arising under section 20 of article X of the state constitution” (specifically enumerating the types of matters included). Section 1-41-102, C.R.S. (2012).

In sum, to the extent that a proposed constitutional amendment referred by the General Assembly pertains to “issues of government financing, spending and taxation governed by article X, section 20,” it may be submitted to the electorate in an odd-numbered year pursuant to Colo. Const. art. X, § 20(3)(a). To the extent that such a referred constitutional amendment pertains to other issues, it must be submitted to the electorate at “the next general election for members of the general assembly” – *i.e.*, in an even-numbered year – pursuant to Colo. Const. art. XIX, § 2(1).

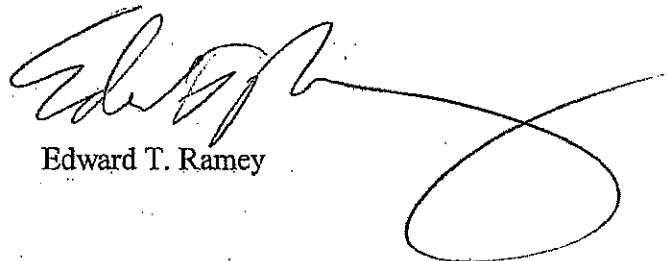
The proposed measure that you have asked us to review contains two components – a tax component clearly within the scope of Colo. Const. art. X, § 20, and a conditional repeal of the entirety of a far broader existing section of article XVIII of the Colorado Constitution regarding the personal use and regulation of marijuana. The latter component clearly and substantially exceeds any reasonable explication of the scope of Colo. Const. art. X, § 20. Further, the latter component does not derive from, nor can it be justified as an effort to implement or effectuate, provisions of the measure that arguably are within the scope of Colo. Const. art. X, § 20. It is our opinion that the second component should and would be governed by Colo. Const. art. XIX, § 2.

As Colo. Const. art. XVIII, §16, could have been adopted only under the procedures of Colo. Const. art. V, § 1(4) or Colo. Const. art. XIX, § 2, it is logical that its wholesale repeal can only occur under the procedures of one of those constitutional sections. Appending this provision to the tax component of the measure would, at best, render the entire measure subject to the procedural constraints of Colo. Const. art. XIX, § 2, or, arguably, invalidate it altogether under the single subject requirement of Colo. Const. art. XIX, § 2(3).

As a result of these constitutional constraints, we believe it is likely that the Secretary of State would properly be subject to injunction from placing the proposed measure, as currently drafted, on the 2013 ballot. Were the measure to proceed to the ballot and a vote, we believe that it would likely face post-adoption invalidation by the courts. Were the tax component of the measure to be rejected and the repeal component approved by the voters, it is also possible that the courts could invalidate the repeal (as being improperly submitted under Colo. Const. art. XIX, § 2) while sustaining the vote on the tax component (as properly submitted under Colo. Const. art. X, § 20), leaving the substance of Colo. Const. art. XVIII, § 16 wholly intact *except* for the tax provisions which were the genesis of the measure's consideration in the first instance.

If we can be of any additional assistance with regard to this matter, please let us know.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Ed Ramey', with a large, stylized loop at the end of the signature.

Edward T. Ramey